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No. 04-27

IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY, MONUMENTAL LIFE INSURANCE COMPANY, AND THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,
Petitioners,

v.

MATTIE BRATCHER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit correctly ruled—under its *Allison* standard the parties agreed applied—that Federal Rule of Civil Procedure 23(b)(2) authorizes class certification of respondents' civil rights claims where the class does not seek compensatory or punitive damages; at least one million class members can benefit from injunctive relief because the race-based insurance policies the petitioning insurers sold them are still in-force; class members each seek $300-$500 in restitution of discriminatory premiums they paid which "negative value" relief flows directly from the insurers' liability to the class as a whole, and can be objectively calculated just as the insurers claim they did in "voluntarily adjusting" some of their race-based policies.

PARTIES

Respondents Mattie Bratcher, John Bratcher, Caroline Brown, Mildred Buford, Maxine Cash, Harriett DeLoach, Sophia Drakeford, Mary Sue Truesdale, Elizabeth Walker, Rosemary Roach, Joseph Bell, Willa Ellis, Alma Hyde, and Thelma Walker Oatis, appearing individually and as representatives of all persons similarly situated ("Policyholders"), are African-American owners, holders or beneficiaries of industrial life insurance policies issued by the insurance company petitioners ("Insurers"). Policyholders were plaintiffs and appellants below who sued the petitioning Insurers for injunctive relief and equitable restitution under 42 U.S.C. §§1981-1982, alleging intentional racial discrimination in the excess premiums charged and reduced benefits provided under their insurance policies.

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INTRODUCTION

The petition should be denied because the asserted conflict among the circuits concerning the controlling standard for Federal Rule of Civil Procedure 23(b)(2) class certification was never raised in the lower courts and is not presented by the record in this case. In the lower courts, the petitioning insurance company defendants ("Insurers") relied on the standards articulated in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), for determining Rule 23(b)(2) class certification. Respondents, African-American policyholders ("Policyholders") who sued Insurers for race discrimination

in the sale of insurance did not contend that Allison was the wrong standard. Instead, Policyholders carefully limited their claims to comply with *Allison*. Contrary to Insurers' repeated assertions that Policyholders seek damages (Pet. 2-4, 14, 18, 20, 25-27), the complaints do not include claims for compensatory or emotional distress damages, and Policyholders withdrew their claim for punitive damages in applying for class certification. (CR 351 at 31:18R 5890)

A class may be certified under Rule 23(b)(2) when: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Citing the Advisory Committee Notes, this Court has stated that civil rights class actions are particularly well-suited for Rule 23(b)(2) certification. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.").

This is a civil rights action under 42 U.S.C. §§ 1981-1982, whose "negative value" circumstances present a paradigm for Rule 23(b)(2) class certification. Policyholders were sold industrial life insurance by the three Insurers or their affiliates. The complaints allege that all such policies, usually in the amount of $2,000 or less, were distorted for decades by the Insurers' intentional race-based discrimination in either charging higher premiums ("dual rates") or providing lower benefits ("dual plans") to black Policyholders as compared to the same policies sold to whites. The Insurers concealed the fact that they had what they labeled "colored" rate books.

In ruling on class certification in this case, the lower courts applied the *Allison* standard. In *Allison*, the Fifth Circuit held that Rule 23(b)(2) class certification was unjustified where plaintiffs' claims for compensatory and punitive damages

were predominant to any injunctive relief sought. *Allison*, 151 F.3d at 425. By contrast, in this case, the Fifth Circuit panel majority correctly held, under *Allison*, that monetary claims did not predominate over Policyholders' claims for injunctive relief in light of the following circumstances:

- Conflicting party experts agree there are at least one million (and plaintiffs' expert estimates 4.5 million) race-based industrial life insurance policies still in-force that could benefit from injunctive relief;
- Instead of compensatory and punitive damages claims, Policyholders seek $300 to $500 each in equitable restitution to make them whole for the higher "colored" premiums they paid Insurers, which relief flows directly from the Insurers' discriminatory conduct toward the class as a whole; and
- Such restitution is capable of objective calculation of the difference between what a black and white person paid for the same policy, just as Insurers themselves claim to have done in "remediating" some of their race-based policies using their own records and actuarial formulas.

(App. 15a-19a) The Fifth Circuit majority opinion, authored by Judge Smith (who also joined in *Allison*), aptly characterized Policyholders' restitution claim here as "the ultimate 'negative value' class action lawsuit," justifying Rule 23(b)(2) class certification. (App. 3a)

In *Allison*, the Fifth Circuit recognized that the existence of a negative value suit is the "most compelling rationale" for certifying a class action. *Allison*, 151 F.3d at 420. As this Court explained, a negative value suit is one in which class members' claims "would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not

available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

In sum, contrary to the petition, any conflict among the courts of appeals about the correct standard for Rule 23(b)(2) class certification is not presented by this case. All parties accepted *Allison* as the applicable standard, and Policyholders demonstrated that their negative value civil rights claims met the *Allison* test. The Fifth Circuit ruled against the petitioning Insurers applying the Allison standard they proposed. Since no issue worthy of certiorari is presented, the petition should be denied.

STATEMENT OF THE CASE

1. Respondents are a class of African-American Policyholders to whom the petitioning Insurers sold low-face-value "industrial" life insurance policies, usually with a death benefit of $2000 or less. (3/20/02 Transcript ("Tr.") 13) Policyholders allege that the Insurers, American National Insurance Company ("ANICO"), Monumental Life Insurance Company ("Monumental"), and Western & Southern Life Insurance Company ("Western & Southern"), and their affiliates, engaged in a pattern of intentional racial discrimination as a matter of deliberate company-wide policy. Although there were 280 affiliated companies, their race-based practices were systematic, uniform and consistent. Specifically, Insurers placed their African-American Policyholders in (i) higher-priced policies (dual rates) or (ii) reduced benefit policies (dual plans), than comparable policies sold to whites. (App. 4a)

The Insurers marketed their industrial life policies to low-income working class people. To African-American workers, the Insurers hawked these policies as "burial" insurance to avoid the humiliation of a pauper's grave. (8R 2502, 2518) Insurers' agents sold the policies and then collected $0.25 to $2.00 premiums weekly or monthly by door-to-door home

visits. (8R 2501) Insurers charged African-Americans higher rates, or paid lower benefits for decades and fraudulently concealed such practices. (*Id.*; Tr. 39). Western & Southern had policy rates labeled Standard Series (White Risks)" and "Class A Series (Colored Risks)." (CR 351 at 18, Diliberto Decl., Ex. 24)

Insurers concede they have "charged different rates to African-Americans and Caucasians." (Pet. 6) An ANICO representative testified in deposition that the company had Standard 1 and Standard 3 industrial policies: "I believe the Standard No. 3 products were sold only to African Americans." (CR 351 at 11-12, Halper Decl., Ex. 2:Dep. 40-42) A Monumental affiliate also sold "colored" premium policies. (CR 379, Wright Decl. Ex. 7:Lotter Supp. ¶¶8-9) Insurers' own statistics expert, Dr. Sangha, testified "correct" when asked in deposition whether "each of these companies" "charged African-Americans more than they charged Caucasians for the same product." (CR 351 at 4, Halper Decl., Ex. 21:Dep. 54:7-17) The Insurers' actuarial expert, Mire, acknowledged that it "was not an uncommon practice in the industry" that insurance companies "in some time periods did have race distinct rate systems that charged African Americans higher premiums." (CR 367, Mire ¶76)

2. Policyholders filed suit against the Insurers under the civil rights laws–42 U.S.C. §§ 1981-1982–seeking injunctive relief to stop the Insurers from continuing to collect the excess race-based premiums, from paying inferior benefits, and to reform the in-force policies. (App. 5a) Policyholders do not seek compensatory or punitive damages. (CR 351 at 31) Policyholders also narrowed the class definition so that it did not encompass black Policyholders who were charged higher rates based on subjective socio-economic criteria. (CR 351 at 22 & n.28; Tr. 38) Only class members who the Insurers charged higher premiums or provided lower benefits based solely on race are included in the class. *Id.*

Policyholders' complaints also seek disgorgement and equitable restitution of the excess race-based premiums Insurers wrongfully collected from them. (8R 2509-10, 2525, 3612; App. 5a) The restitution Policyholders seek is classic "negative-value" recovery of amounts ranging from $300 to $500 per policy in most cases. (App. 3a) For example, a black policyholder who pays 50 cents per week for a $500 policy will pay $650 if payments are made for 25 years ($0.50 x 52 weeks x 25 years). A white insured who pays only 25 cents per week for the same policy pays only $325. Thus, the race-based amount collected was $325. If five million such policies were sold, the insurers collected some $1.6 billion in race-based premiums over a 25-year period.

But these policies were in effect much longer. The named Policyholders purchased their policies between 1937 and 1974, and they are still in force. (CR 351 at 8, 13, 20-21) Although the Insurers began to discontinue selling new overtly race-based premium and benefit policies in 1964, such sales continued through 1981. (Tr. 19:22) Insurers continue to collect discriminatory premiums from African-Americans on policies sold 20 to 40 years ago. (CR 351 at 14, Halper Decl., Ex. 11-13)

In 1988, under pressure from regulators, Insurers Western & Southern and ANICO began sporadic partial adjustment ("remediation") of their policies to remove the race-based disparities. (CR 351 at 4, 9, 15, 19) Monumental has not adjusted any race-based policies, and ANICO has adjusted only one of its four policies. (CR 351 at 9, 15, Halper Decl., Ex. 11, Cravins Decl., Ex. 22) Policyholders' expert estimated, that 4.5 million of 5.6 million industrial policies remain in force. (App. 5a) Defendants' expert claimed 80% of those policies had lapsed, been paid off, were no longer in-force, or had been remediated. (App. 5a) But, even under his estimate at least one million policies remain in-force and unremediated. At the hearing, Insurers' counsel acknow-

ledged "we can estimate, but we don't know" how many policies remain in-force. (Tr. 31:18) The district court admitted both reports in evidence (Tr. 5:4), did not explicitly accept or reject either one, but implicitly concluded that at least one million policies were in force. (App 51a-52a n.1)

Insurers' belated remediation of some of their own policies unwittingly acknowledges that their records are sufficient to calculate the disparities in premiums and benefits in their discriminatory, dual rate and dual plan policies, since they claim to have "voluntarily adjusted" those policies themselves. (App. 16a, 19a) Insurers admit they have policies, rate books, and computerized data on their policies. (CR 351 at 10)

Due to the nature of the Insurers' practices, class members were unable to discover the discriminatory conduct until the late 1990s. Because the Insurers never disclosed their discriminatory "colored" rate books to Policyholders and priced their policies in a fashion that made any comparison of premiums all but impossible, Policyholders had no ability to discover that they had been disadvantaged by the Insurers' discriminatory practices. The Insurers, however, claim that class members should have known of the discriminatory conduct. The Insurers point to media articles that appeared sporadically around the country. Much of this infrequent media treatment appeared in newspapers of national circulation. (App. 21a) At most, some of the publications vaguely comment that "white insurance companies charged African-Americans more for life insurance." None of the publications identifies the Insurers named in this case or discusses their discriminatory practices.

3. Pursuant to Federal Rule of Civil Procedure 23(b)(2), Policyholders moved to certify a class comprised of: "All African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." (App. 6a)

Although the district court consolidated the separate actions against the three Insurers to determine class certification (3R 945), Policyholders seek to certify a separate Rule 23(b)(2) class against each of the three Insurers. (19R 6382) The district court denied class certification. The court ruled that monetary relief predominated over injunctive relief because the Insurers no longer sell industrial life insurance and because a majority of the policies previously sold have either been paid, lapsed or adjusted, or are no longer in-force. (App. 54a-56a) The district court also stated that "the requested monetary relief is not incidental to the request for injunctive relief because it does not flow directly from the class as a whole . . . ." (App. 55a)[1] The court also concluded "personalized hearings" would be required to determine the harm "to each individual plaintiff" caused by the Insurers "differing underwriting practices," polices and pricing. (App. 55a-57a) The district court also believed that individualized hearings would be required to address statute of limitations issues, rejecting Policyholders' argument that fraudulent concealment and constructive notice could be determined on a class-wide basis. (App. 57a)

4. The Fifth Circuit accepted Policyholders' Federal Rule of Civil Procedure 23(f) appeal (20R 6563), and reversed. (App. 3a) The panel majority held that (i) because one million to 4.5 million industrial policies remained in-force, a sufficient proportion of the class was still paying discriminatory rates and thus could benefit from injunctive relief, (ii) equitable restitution of the higher premiums paid (or lower benefits received) could be objectively calculated

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[1] The district court's statement that monetary relief "does not flow directly ***from the class*** as a whole" mistakenly reads the Rule 23(b)(2) standard backwards. (App.55a, emphasis added) Under the *Allison* standard, monetary relief must "flow directly from [defendants'] liability ***to the class*** *as a whole*." *Allison*, 151 F.3d at 415 (emphasis added, italics by the Court).

by comparing the Insurers' own policies and records for black and white rates and benefits without individualized subjective evidence–just as Insurers claimed they had done in remediating some policies, and (iii) petitioners' statute of limitations defense could be determined on a class-wide basis because the Insurers relied on a theory of constructive notice. (App. 9a-21a)

Judge Smith's opinion for the Fifth Circuit panel majority applied the standard in *Allison*, 151 F.3d at 415, "that monetary relief, to be viable in a rule 23(b)(2) class, must 'flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.'" (App. 11a, italics in original) The panel majority held that the class could be certified under Rule 23(b)(2) consistent with *Allison*. (App. 10a) The panel explained that, in contrast to this case, in cases where only a negligible portion of a class would benefit from injunctive relief, Rule 23(b)(2) certification is not appropriate, as was true in *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978 n.46 (5th Cir. 2000) (only one of one million class members faced further harm that could benefit from an injunction). (App. 11a-12a) The panel majority pointed out that in this case, where one million to 4.5 million policies remain in-force on which Insurers continue to collect discriminatory premiums, the class is properly seeking and can benefit from injunctive relief. (App. 12a)

The panel majority also ruled that "assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy." (App 17a) The panel added that the Insurers' own records contain the information needed to compare black and white policies: "Defendants' complaints to the contrary are belied by the fact that, since 1988, many policies have been adjusted [by the Insurers themselves] to account for racial disparity." (App 19a).

The panel reversed the district court's ruling that Insurers' statute of limitations defense raised individual issues precluding class certification. The panel pointed out that Policyholders alleged that the Insurers engaged in a common scheme of fraudulent concealment and that Insurers defended on a theory of constructive notice. To the panel, both issues were determinable class-wide because federal law determines when the limitations period accrues. (App. 19a) Insurers did not contend or proffer evidence that the sporadic media reports of race discrimination in the insurance industry were local, regional or individual in scope–but rather were national and therefore determinable class-wide. (App. 20a-21a) Insurers' petition for rehearing en banc was denied without a single judge calling for a vote. (App. 3a)

REASONS FOR DENYING THE PETITION

A. The Writ Should Be Denied Because Any Asserted Conflict Among the Circuits Claimed in the Petition Was Never Raised in the Lower Courts Where the Parties Agreed that the Fifth Circuit's *Allison* Standard for Rule 23(b)(2) Class Certification Controls

This case is not appropriate for review to resolve a circuit split–if one exists. First, in the district court and on appeal, the petitioning Insurers embraced the Fifth Circuit's standard in *Allison*, 151 F.3d at 415, because it sets forth the strictest test for Rule 23(b)(2) class certification. Second, the petition concedes that *Allison* expresses the majority rule endorsed by at least four other circuits. Third, respondent Policyholders carefully narrowed the class to satisfy *Allison* and never urged the lower courts to use any other standard. This case was litigated by the parties and decided by the courts entirely under the *Allison* standard. In short, this case involved a fact-specific and fact-bound application of the *Allison* standard. Insurers' unsupported claim of "forum-shopping" (Pet. 23) is

belied by Policyholders' filing their suits in Louisiana and Texas district courts–governed by *Allison*.

Apparently recognizing that no circuit conflict in standards is presented in this case, Insurers roll out their "parade-of-horribles" strategy. (Pet. 21-29) They begin by suggesting that class actions "call into question the structure, operation, and survival of entire businesses or industries." (Pet. 21) They claim the boundary between Rule 23(b)(2) and 23(b)(3) classes is "vanishing." (Pet. 24) Insurers also complain that "thousands of class actions" are pending (Pet. 21)–but do not explain why that is inappropriate and ignore how few are even certified.

This Court has expressed skepticism about such "sky-is-falling rhetoric" by corporations trying to avoid liability for racial discrimination: "We do not believe that disparate impact theory need have any chilling effect on legitimate business practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

The petitioning Insurers are on the wrong battlefield. They seek review by writ of certiorari to resolve a supposed circuit split concerning the controlling standard for Rule 23(b)(2) class certification. Yet, the parties in this case never disputed the legal standard that applied. The Insurers said Allison controlled, the policyholders agreed, and the lower courts applied *Allison*. In sum, there was a straight-forward application of *Allison* to the factual circumstances of this case that no active judge of the Fifth Circuit, including the dissenter, thought worthy of even a vote for en banc rehearing. (App. 3a)

B. The Writ Should Be Denied Because the Record Does Not Present a Recurring and Important Question but Rather a Fact-Bound Application of the *Allison* Standard

1. The Class Does Not Seek Compensatory or Punitive Damages

Quoting isolated snippets from Judge Smith's opinion for the Fifth Circuit panel, the petitioning Insurers repeatedly claim on nearly every page of their petition that the class seeks "damages." (Pet. 2-4, 14, 18, 20, 25-27) Insurers refuse to acknowledge that Policyholders never sought compensatory or emotional distress damages in their complaint and withdrew their claim for punitive damages in applying for class certification. Instead, Policyholders only seek restitution for past premium overcharges. Petitioners never mention the negative value–a few hundred dollars–of each class member's restitution claim, doubtless because it provides compelling justification for class certification. *Shutts*, 472 U.S. at 809.

By misdirecting the analysis to damages, Insurers hope to avoid judicial scrutiny of the class-wide impact of the invidious race discrimination they practiced for 50 years under the guise of what they still attempt to excuse as "sound actuarial calculations." (Pet. 7) Even as the district judge denied class certification, however, he expressed dismay at petitioners' attempt to rationalize their overtly discriminatory "colored" rate books:

> The Court cannot overlook its discomfort that one company's papers distinguished between "colored" persons and Caucasians, and that still another company had two premium grading policies, one for African-Americans and one for Caucasians. Defendants' response that these were state-permitted underwriting practices that involved socio-economic factors and

> not race-intended discrimination could be seen, preliminarily, as somewhat limp.

(App. 58a–n.8) Earlier, at the class certification hearing, the district court found that "at least two of these companies apparently have come about as close as possible to admitting that they are discriminating." (Tr. 14:3-5) When insurance company counsel contended that "this was legal at the time," the court bristled: "don't tell me it was legal." (*Id.* Tr. 22-23)

2. At Least One Million and Up to 4.5 Million Class Members Seek and Can Benefit from Injunctive Relief

The parties offered conflicting expert reports that included estimates of the number of industrial life insurance policies still in-force. Insurers claimed that most of their policies had been paid off, lapsed or adjusted. Their expert estimated 80% of the 5.6 million industrial policies had been terminated–meaning one million were still in-force. (CR 382, Mire Supp. ¶3) Insurers counsel acknowledged "we can estimate but we don't know." (Tr. 31:18) Policyholders' expert estimated that only one million of 5.6 million policies had terminated and that 4.5 million were still in-force. (CR 379) The district court admitted both reports in evidence. (Tr. 5:4), but made no finding between them except to implicitly accept the one million estimate both experts agreed upon. (App. 51a-52a n.1)

The Fifth Circuit majority noted both estimates and concluded that a substantial number of class members, at least one million, could benefit from injunctive relief, which was sufficient to justify certifying a Rule 23(b)(2) class. (App. 5a, 12a) The panel distinguished an earlier Fifth Circuit decision in *Bolin* rejecting Rule 23(b)(2) class certification because the record in that case revealed only one class member could benefit from injunctive relief. *Bolin*, 231 F.3d at 978 n.46. The panel majority decision in this case is consistent with the

Third Circuit's reasoning that not all class members need benefit from injunctive relief, as long as a substantial proportion of the class benefits–as was true here. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 253 (3d Cir. 1975).

In sum, the experts agreed that at least one million (and plaintiffs' expert estimated 4.5 million) race-based policies remain in-force upon which Insurers collect excess premiums. Insurers should not be collecting "colored" rates from even one policyholder. Their continued collection from a million or more black citizens justifies class-wide injunctive relief under Rule 23(b)(2).

3. The Class Seeks Restitution of a Few Hundred Dollars Per Class Member that Flows Directly from Insurers' Liability to the Class and Can Be Objectively Calculated Using Insurers' Own Records

As the district court observed, Insurers have admitted in deposition that they maintained a higher rate–lower benefit "colored" policy structure. (App. 58a–n.10; Tr. 14) Thus, there is a strong likelihood that Policyholders will be able to sustain their burden of proving that Insurers engaged in a systematic practice of race-based discrimination in violation of 42 U.S.C. §§1981-1982; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-37 (1977). Sections 1981 and 1982 bar racial discrimination in contracts and sale of property by private individuals–including Insurers. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-37 (1968). These provisions are designed "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443.

Once liability is found, the civil rights laws provide for injunctive relief to eliminate so far as possible, the last vestiges of Insurers' discriminatory practices. *Teamsters*, 431 U.S. at 364. An equally important remedy is "to make

persons whole for injuries suffered" as a result of the Insurers' unlawful discrimination. *Id.*; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-23 (1975). In Albemarle, this Court stated that "[w]here racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Id.* at 418 (citation omitted); *accord Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-71 (1976).

Both remedies justify class certification in this case. As previously discussed, those Policyholders still injured by in-force policies will benefit from injunctive relief to stop collection of discriminatory premiums and to reform policies to equalize benefits. But such remedies would be of "of little comfort to the victims" of the Insurers' earlier discrimination "and could not erase [their] previous illegal conduct or its obligation to afford relief to those who suffered because of it." *Teamsters*, 431 U.S. at 341-42.

In *Albemarle*, this Court held that "back pay may be awarded on a class basis" to make-whole the victims of employment discrimination. 422 U.S. at 414 n.8. In this case, the Fifth Circuit panel held that the Policyholders' claim for restitution of the "difference between what a black and white paid for the same policy" is a remedy that flows "from liability in much the same manner that an award of back pay results from a finding of employment discrimination." (App. 17a) In *Allison*, the Fifth Circuit stated that "if the instant case involved only claims for equitable monetary relief, Pettway [a back pay case] would control." *Allison*, 151 F.3d at 415-16. Equitable monetary relief is exactly what Policyholders seek in this case–and it should be available to a Rule 23(b)(2) class. Policyholders are not seeking damages to which they are contractually entitled under the insurance policies. They are seeking disgorgement and true

restitution of money wrongfully taken by Insurers that "in good conscience" belongs to Policyholders. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000).

Insurers nevertheless assert that individual hearings would be required to determine the amount of each class members' restitution, and that such determination would be complicated by differing underwriting practices, benefits, and age at policy issuance, of the numerous policies issued. As the Fifth Circuit aptly observed, however, Insurers' sky-is-falling rhetoric is "belied by the fact that, since 1988, many policies have been adjusted to account for racial disparity." (App. 19a) Insurers themselves claimed they remediated many of their industrial policies. (App. 5a) They used their own records, rate books and policies and the same standardized actuarial formulas proposed by the class. (App. 18a) While there are a number of policy variables, none require subjective evidence and all "are identifiable on a classwide basis." (App. 18a)

The Insurers' actuarial expert acknowledged that industrial life policies were "very simple" and were offered in only seven basic plans. (CR 367, Mire ¶30) He also acknowledged these low face amount policies usually had only two rate classes. (Id. ¶70) Policyholders' actuarial expert stated that the disparities could be calculated using formulas and grids. (CR 351, Lotter at 31; CR 379, Lotter ¶¶2-6, 11) As the panel majority concluded: "assuming that unlawful discrimination is found, class members automatically will be entitled to the difference between what a black and a white paid for the same policy." (App. 17a) This conclusion was fully consistent with the *Allison* standard because, as the panel majority explained, unlike *Allison*, none of the few policy variables in this case required "the gathering of subjective evidence" as would be true if class members sought compensatory or punitive damages. (App. 17a)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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